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**CONSULTATION ON PROHIBITING EMPLOYMENT AGENCIES AND
EMPLOYMENT BUSINESSES FROM ADVERTISING JOBS EXCLUSIVELY IN OTHER
EEA COUNTRIES**

EMPLOYMENT LAWYERS ASSOCIATION'S RESPONSE

2 SEPTEMBER 2014

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1 INTRODUCTION

- 1.1 The Employment Lawyers Association ("**ELA**") is an unaffiliated and non-political group of specialists in the field of employment law and includes those who represent and advise both employers and employees. It is therefore not our role to comment on the political merits or otherwise of proposed legislation, rather we make observations from a legal standpoint.
- 1.2 ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.
- 1.3 A working group was set up by the Legislative and Policy Committee of ELA under the co-chairmanship of Robert Davies and David Ludlow to consider and comment on the Government's "Consultation on prohibiting employment agencies and employment businesses from advertising jobs exclusively in other EEA countries". Our response is set out below. A full list of the members of the working group is attached.

2 OVERVIEW

- 2.1 The Government has set out the objective of creating a level playing field for workers in Britain. However, ELA is concerned that the Government's initiative (to prohibit employment agencies and employment businesses from advertising jobs exclusively in other EEA countries) is, on its own, unlikely to achieve such objective. Furthermore, in our view, the proposed amendments to the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003, as set out in Annex A of the consultation (the "**draft regulation**") are unlikely to achieve the immediate limited objective that the legislation is designed to address. The draft regulation appears to be capable of being circumvented with relative ease by agencies/hirers who may be so minded. Therefore it would appear to have the effect in practice of increasing the administrative

burden for the large majority of employment agencies and businesses who, in the experience of the Working Group, are not currently advertising roles solely in the EEA, and to the exclusion of UK workers, in any event.

3 CONSULTATION QUESTIONS

1. (a) **Do you think that the draft regulation meets the Government's objective of creating a level playing field for workers in Britain by prohibiting employment agencies and employment businesses from advertising jobs solely in other EEA countries?**

Yes No

- (b) **Please provide comments**

In light of the content of the Impact Assessment (*para 18: "There is little evidence available on whether any firms advertise GB jobs exclusively outside of Britain and it is likely that at most only a very small minority of recruitment firms would do so"*), the Regulatory Policy Committee's comments of 11 August 2014 and the Working Group members' own knowledge of common practices within the recruitment sector, ELA is concerned that there is insufficient evidence to indicate that significant numbers of employment agencies or employment businesses do in fact advertise roles solely in other EEA countries.

Furthermore, although the issue is not considered in the Impact Assessment, the impression of the Working Group is that EAS will have insufficient resources to enforce any such new rule. Overall it is ELA's view that whilst it may be a step in the right direction, the stated objective of creating a level playing field for workers in Britain will not be achieved through this measure alone.

2. **If you answered 'no' to Question 1, why do you think that the draft regulation will not meet the Government's objective?**

Please see our response to Question 1 above. The draft regulation has a very narrow scope. In particular, it does not on the face of it apply to:

- (a) advertisements for GB vacancies (as defined in the draft regulation) by hirers/end-users/managed service contractors;
- (b) advertisements for GB vacancies by employment businesses and agencies which are based in other EEA countries (such as a Polish agent)at the request of a hirer or an employment business or agency ; or
- (c) recruitment fairs held in other EEA countries where there is no specific vacancy advertised, but at which general information about roles based in Great Britain is provided and candidates' details accumulated.

Provided that an employment agency or employment business advertises a role on its website which is accessible in Great Britain (or on Universal Jobmatch) it will be deemed to have complied with the draft regulation. However, there are many reasons why individuals based in Great Britain might not look at those particular websites (e.g. the employment agency or employment business markets itself as a business acting on behalf of workers from another EEA country), in which case an advert on their website would seem to do little in practice to achieve the Government's objective.

3. Do you agree that the regulation is appropriate to deal with recruitment advertising on websites?

No. In ELA's view the draft regulation is of limited scope in that, given the jurisdiction to which the 2003 Conduct Regulations apply generally (namely Great Britain), it only relates to advertising by GB based employment businesses and employment agencies (not overseas agencies or hirers/end-users/managed service contractors/overseas recruitment fairs).

Section 39(1)(a) of the Equality Act 2010 already provides applicants for vacancies with protection from discrimination and, if the Government has evidence that such agencies and businesses are only advertising roles in other EEA countries, then it would seem appropriate for the Government to publicise this in order that applicants may gain greater awareness of the ability to invoke and pursue their rights. It may be that one reason for what is the perceived low level of such claims or complaints is the lack of awareness of any such discriminatory approach to recruitment.

4. (a) We believe that the new regulation would both expand the range of job opportunities open to people in the UK and also expand the range of people that businesses can choose from. Do you agree?

Yes No

No. This is because ELA is not aware of data from which it can be objectively demonstrated that significant numbers of employment agencies and employment businesses are advertising for GB vacancies solely in other EEA countries and as noted in our response to Question 1(b) the experience of the Working Group is that that does not appear to be the case in practice.

(b) Can you see any downsides – in terms of costs or any other issues?

Yes No

(c) Please provide comments

ELA considers that the draft regulation will impose a disproportionate and un-necessary administrative burden on employment businesses and employment agencies, particularly where different advertising methods are used in Great Britain as in other EEA countries.

Employment businesses and employment agencies will, to some extent at least, have to put in place additional administrative procedures in order to evidence that they have advertised in English in Great Britain before or at the same time as they advertise in other EEA countries. This will involve additional record keeping and could extend to investment in specific software, which for example facilitates screen-shots capturing an advert when it is placed. Employment businesses and agencies may feel compelled to do this to ensure they have evidence of compliance in an investigation conducted by the EAS and a defence to any prosecution. It is unclear how long such evidence would need to be retained and may be expected to increase data processing/storage costs in practice.

5. (a) Do you have any information about jobs that have been advertised solely in other EEA countries?

Yes No

(b) Please provide details e.g. what was the job being advertised, where was the job advertised?

N/A

6. Do you have any other comments to add in relation to this consultation?

ELA's view is that the draft regulation would be capable of being circumvented with relative ease by those who may be minded so to do. Employment agencies and employment businesses place vacancies on behalf of their clients. If a client asks an employment agency or employment business to advertise a role solely to countries outside of Great Britain then, although that would be caught, but consider the position where an agency contacts a correspondent employment business or agency in another EEA country to ask them to place such advertisement – draft regulation (4) (a) is not in our view sufficiently clear to prohibit such indirect advertising. Similarly the hirer could make such a request of an employment agency or business based in another EEA country directly. (Also the hirer could simply advertise the post itself although we appreciate that the focus of the amendment in the draft regulation is upon scenarios where intermediaries are being involved.)

The potential effectiveness of the approach envisaged in the Consultation document appears inextricably linked to the ability to enforce the draft regulation. EAS resources have recently been reduced and our view is that the mere threat of an improvement notice is probably an insufficient deterrent to any employment businesses and agencies that do in fact currently operate in a manner that would be prohibited by the draft regulation.

Guidance issued with the draft regulation should make clear that it applies to permanent, temporary, fixed-term, part-time, full-time and freelance vacancies (if, as we assume is the case, this is the intention). It is unclear from the draft regulation and the Consultation document if the measure is intended to apply to roles which are to be filled by those performing work on a self-employed basis, but such uncertainty stems perhaps from the definition of "employment" in the 1973 Act.

Any employment business, and, to the extent that in terms of the Equality Act 2010 it is an "employer", an employment agency also, based in the United Kingdom that only advertises GB roles in other EEA countries, is already prima facie in breach of Section 39 of the Equality Act 2010 and therefore ELA query if it is necessary to create additional regulation to prevent this activity, particularly given the lack of evidence of advertisements solely being placed in non-EEA countries.

Publicising the fact that applicants have this right under the Equality Act 2010 may be an alternative to more regulation, which may anyway be difficult to enforce.

It is also unclear from the Consultation paper the extent to which the Government views the level of responsibility (or culpability) in relation to such recruitment/advertising practices that should fall to ultimate hirers/employers.. It may be that this is an aspect of the "wider reforms" which are to be considered (as per Paragraph 16, Page 8 of the Consultation paper) but one potential way to help/bolster the enforcement of the new proposed advertising

requirement, might be if the ultimate hirer was required either to check that the relevant job had been advertised in the UK and in English or to obtain written confirmation from the employment agency/business that they have complied with the draft regulation.

Employers can, of course, be liable for the acts of their agents in any discrimination claim, regardless of whether they gave specific instructions to discriminate to the agent.

Furthermore, employers (including employment businesses) and their agents can be liable for indirect discrimination where they apply a provision, criterion or practice of not recruiting in GB where the majority of people will be British although such an employer may be able to justify such indirect discrimination of only advertising for roles in other EEA countries as a proportionate means of achieving a legitimate aim.

It is noted that the Equality and Human Rights Commission will shortly be commencing a research project looking more widely at potential discriminatory recruitment practices, by employers as well as employment agencies and employment businesses. Consideration should be given whether it may be appropriate/preferable to wait for the outcome of that research before seeking to frame and implement any changes to current legislation, whether in respect of the draft regulation or the wider reforms referred to at Paragraph 16, page 8 of the Consultation paper.

Annex

Members of the ELA Working Party

David Ludlow	Barlow Robbins LLP
Robert Davies	CMS Cameron McKenna LLP
Tessa Fry	GSC Solicitors LLP
Philip Harman	DWF LLP
Esther Martin	CM Murray LLP
Simon Whitehead	HRC Law LLP
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